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**Before the
Federal Communications Commission
Washington DC 20544**

In the matter of	CG Docket No. 02-278
Credit Union National Association Petition for Declaratory Ruling	Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991
	DA 17-798 6 October 2017

**Gerald Roylance's Comments re Credit Union National
Association Petition for Declaratory Ruling**

In DA 17-798,¹ the FCC seeks comment about Credit Union National Association's Petition for Declaratory Ruling.² The CUNA Petition wants either an established business relationship exemption for "informational" calls to wireless numbers or an exemption for calls to wireless numbers that just happen to be free. Both alternatives should be denied.

First, the FCC does not possess statutory authority to create an EBR exemption for calls to wireless numbers. CUNA does not understand that, and more shockingly FCC

¹ FCC, 6 October 2017, *Consumer and Governmental Affairs Bureau Seeks Comment on Credit Union National Association Petition for Declaratory Ruling under the Telephone Consumer Protection Act of 1991*. <https://ecfsapi.fcc.gov/file/1006030028804/DA-17-978A1.pdf>

² Credit Union National Association, 29 September 2017, *Petition for Declaratory Ruling*, <https://ecfsapi.fcc.gov/file/10929652106182/CUNA%20petition%20draft.pdf>

staff does not understand that. The Public Notice should never have entertained that option. The Petition is dead wrong when it claims, “Nothing in the TCPA bars the Commission from adopting an EBR exemption for informational calls to wireless phones.” Generally, Congress prohibited all calls made without “the prior express consent of the called party” to cellular telephones at 47 USC (s) 227(b)(1)(A)(iii). The FCC has limited authority to exempt calls at 227(b)(2)(C) but only if the consumer is not charged for the call. In prior petitions, the FCC has insisted on FTEU. Furthermore, Congress instructed in the TCPA that the exemption MUST protect the privacy rights of the consumer: exemptions must be “in the interest of the privacy rights this section is intended to protect”. Congress did not say that exemptions were about protecting the economic interests of the business caller. The petition is not about the privacy rights of the consumer, but easing the financial burden placed on credit unions to follow the TCPA and its regulations. Why should credit unions get preferred treatment over other small businesses that confront similar costs. Moreover, exemptions have the sinister twist that consumers cannot turn them off. They become a right of the caller. Although one can infer consent from an EBR, such consent is implied rather than express; the TCPA requires express consent. The courts have taken a dim view of the FCC inferring express consent.

Second, exempting calls that happen to free to the end user is an odd request. It says that if a credit union is sued for sending texts to cellular telephones, then it can employ an affirmative defense for some plaintiffs. It is not a company being proactive about its practices but rather minimizing its exposure for its own bad acts. Once again, such an exemption does not show any interest in the consumer’s privacy rights. It also goes further down the slippery that any call to a cellular telephone for which the consumer is not charged should not be actionable. Defendants routinely make that argument by twisting 227(b)(1)(B) to prohibit calls to “cellular telephone service ... for which the called party is charged for the call”; if the plaintiff was not charged, then there was no injury. Such an interpretation violates the last antecedent rule. Congress knew that automated calls annoyed consumers, infringed consumer privacy, and that cellular telephones (unlike residential lines) were carried everywhere. Please read the findings of Public Law 102-243. For example, “the evidence presented to the Congress indicates

that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call” (finding 13). That should impose a high burden for approving any exemption. When Congress looked at the problem, the only balance against privacy rights it saw was emergencies. The recent Northern California wildfires are a good example. A friend of mine got a call in the dead of night that he needed to evacuate right now; the fire was a few thousand feet from his home. Such an incident clearly outweighs a notion of privacy. Generally, the FCC has ignored the Congressional privacy instruction and permitted the widest possible exemptions.

The FCC prior exemptions impact this petition. The petitioners point out that the FCC permits “informational” prerecorded calls to residential telephones. It then uses that permission to bootstrap its argument that most people now use cell phones, so companies (not just credit unions) should be able to call those users with the same messages that they can send to landlines. See, for example, Petition page 15 that states, “Finally, although adopting an EBR for credit unions’ informational calls or messages to wireless numbers will go far toward equalizing rules between residential and wireless subscribers, an EBR exemption would not be as broad as the blanket exemption for all informational calls to residential lines created by the Commission’s rules.”

If the FCC had obeyed Congress and had not given a blanket exemption for prerecorded calls to residences, then the petition would be on much different footing. The FCC ignored completely finding 10: “Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.” Shame on the FCC for permitting what Congress deemed a nuisance and an invasion of privacy.

By the way, the Petition points to the Congressional findings 1 through 9 to reinforce the notion that the TCPA was about prohibiting telemarketing. CUNA needs to heed all the findings. Privacy is also big.

Due to the generosity and excess of the FCC, those of us with landlines can expect to be inundated with lots of prerecorded crap calls. At least one can get away

from residential calls by going to work or to a movie. When we are home, the prime assaults will be during dinner time or the weekend. Answering a landline is a big deal. I have to get up, go to the phone, and pick up the handset. And then I find out it robot. Yes, many of the calls are illegal solicitations, but some are FCC-approved. There's a recall campaign for a local judge, and some retired judge did a robocall asking people to not sign the petition being circulated. I don't want that crap from a robot.

There's a huge difference between a landline and cellphone. The cellphone travels to work, play, and everywhere else. There is no quiet time at work and no escape. That can be a blessing. I can call the neighbor's cell to tell her that her son was injured in a bicycle accident. But I'm a person and not a machine, and the message is important to the neighbor.

The Petition also uses code-speak. It wants to exempt "informational" calls, but what is an informational call? Probably everything that is not an unsolicited advertisement. "Wireless informational calls by credit unions to member-owners with whom they have an established business relationship that impart critical financial information, or financial educational information, or communications relating to governance should not be considered a nuisance or an invasion of privacy. These are calls that member-owners expect and want." If the "member-owners expect and want" these calls, then it should be trivial for the credit unions to get express consent for them. When they open an account, give them the option. When you send them a statement, ask them for consent. If the member-owners later decide they don't want the calls, then it should be trivial to revoke the consent. Good businesses don't want to piss off their customers. The FCC should not decide that credit unions or companies may unilaterally send "informational calls". The FCC isn't close enough to the consumer to get a good sense of that. Currently the docket is overrun with industry comments, but they are looking out for the business. The consumers are the ones who will be hit with the calls.

What, exactly, are these informational calls? "As described above, the member-specific calls and texts credit unions seek to make provide vital, time-sensitive information consumers welcome, expect, and often rely on to make informed financial

decisions. These communications include opportunities for members to address an outstanding debt before incurring additional fees; account balance and overdraft alerts; possible security breaches of members' personal and financial information; and payment card usage and fraud alerts: all of which are in alignment with the purpose and mission of credit unions, the directives from the CFPB, and the legislative intent behind the TCPA. Such timely communications have the potential to protect consumers from considerable financial harm.”

Such a list may sound good at first, but what is it really? “Addressing outstanding debt” is a debt collection call. Such calls are often intrusive, and how is an automated call going to change much? Overdraft alerts? The Petition makes claims about the telephone market changing, and the same thing applies to financial markets. I don't write checks anymore. Credit unions can easily decline overdrafts. If I try to use my credit or debit card, and if it is declined, then I know something is wrong. I don't need the text message from my financial institution. A “security breach” message is not about something bad that I did but rather the poor security done by the financial institution. There are many laws in place that require the financial institution to send me a letter and to indemnify me against such breaches. See also Gramm-Leach-Bliley Act. Companies that have been lax in their security measures do not like the price tag, but the price tag is an impetus to up their security. The current Petition is all about credit unions economizing on their vigilance.

Payment card usage and fraud alerts is a better argument, but it is a problem with US financial procedures. In the US, someone with a credit number can make a purchase. Given the low cost of technology, that's a pretty stupid thing to do. In less developed countries, payments are managed on a smart phone. Bank of America has one-time use credit card numbers. You can steal the number, but it is worthless. Even some websites are requiring more secure login protocols. The credit union can easily offer a service where the charge approval requires a separate interaction with the customer's cellular telephone. A friend of mine started a company on the notion that consumers would pay for such a service.

My bank has called me about suspicious charges on my account. It's always been a call from a live person; it has never been an automated call. One call was about a charge by a body-building supplement company; the company had a history of fraudulent charges, so the bank had declined the charge. It called me to see if I really wanted to order the supplements. I live in California. One day my bank called me because it declined a SECOND charge to my account. Earlier in the day, someone in Louisiana had made an online purchase of an iPhone 5 to be picked up at a Wal-Mart in Detroit. The iPhone was picked up, and they tried to repeat the order. That's when my bank declined. A real person called me, told me the situation, and asked if I had made the purchases. I said no, so my bank reversed the charges on the earlier transaction. Wal-Mart threw a fit, but there's very little validation in these transactions. Also notice that the first transaction had gone through: the value of instant contact with me was gone. The kid in Detroit had the iPhone, and that iPhone was not coming back. It's closing the barn door after the cow has left.

Looking back on those calls, I don't see them being handled by prerecorded messages. I think many customers would give prior express consent for fraudulent transaction warnings, but those messages would have to be meaningful in some significant way for the consumer to continue to consent to them. I could see many people going for a cellphone app that authenticated every transaction. Instead of that, the industry's went for chip-based cards, and the result is an abomination. How much time have you waited for such transactions to complete? Even the checkout clerks are mad.

I'm also not sure about how time-sensitive these calls are. If the transaction is still being processed, then it can be time sensitive. If the transaction has been completed, then there's still 60 days to do a charge back. I don't need to know about the transaction right away. After all, I might be at work and not able to do anything about it right then.

The proposed scenarios are also when the credit union has recognized something is wrong. The thing to do is to stop approving charges, but that is often not what banks have done. A few years ago some banks got into trouble. Instead of declining overdrafts, they would pay on the overdraft and charge an overdraft fee. So it could be you bought a

\$10 lunch, and the bank paid the \$10 and hit you with a \$25 overdraft fee. The game was even more pernicious. The bank would sort the transactions so the largest value transaction was deducted first. That meant there could be several small transactions that would get hit with the overdraft fees. That's not an industry that is looking out for the consumer. I'm not saying the credit unions are like that, but certainly a simple solution is to decline the charge rather than send a robocall or a text.

The Petition also makes a big deal out of the credit union being a small operation. If it is a small operation, it won't have a lot of members or a lot of charges. The overdraft scenarios that they paint would be small in number, and there would not be a need to automate them. If they have members who are continually running into overdraft problems, then the thing to do is raise the fees for that member or to cancel the membership. Credit unions are supposed to be lean and efficient and selective about their members.

The Petition is also too coarse grained. I think I'm more informed than the average consumer, and I would not consent to a blanket approval. I might approve fraudulent transaction warnings, but I would not include debt collection calls. I'm not behind in my debt, but I've heard too many horror stories about debtors being inundated with collection calls to which they have allegedly consented. Let me pick and choose the automated calls to which I consent. Don't make me take them all.

Determining the legality of a call by its content also impinges the Free Speech issue. Government regulation should be content-neutral. When it stops being content-neutral, then it is regulating speech rather than privacy. The FCC is outside the line if it thinks it can exempt automated calls from credit unions but prohibit similar calls from banks (which don't have member-owners) or department store calls that want to inform customers that their bills are overdue. The FCC cannot play favorites. If it grants an exemption to credit unions, then must grant the same rights to banks and stores, and then it has gutted the TCPA.

And we are not talking about calls from actual persons. The TCPA does not prohibit credit union personnel from making direct dial calls to cellular telephones with fraud warnings or overdraft notices.

CUNA does not want to worry about guaranteeing calls to consumers are FTEU. CUNA wants a get out of jail free card because it does not want to spend money making sure that its systems have the consent they need. If a credit union is going to spend money on an automated calling system, then it should spend a little extra money to make sure it does everything right. That's the reason for the statutory damages provision in the TCPA. The credit union does not need an automated system, but if it decides to use one, then it better do it right. The TCPA will not ding the small credit union for making live calls about overdrafts or fraud alerts to its owner-members. If the credit union buys an automated system and starts voice or text blasting its owner-members without consent, then it is in trouble.

CUNA has done a good job of getting its members to comment on this Petition. That shows that CUNA could do a good job of informing its members about what they can and cannot do with respect to the TCPA. That would be a good service for CUNA's members, and it would serve the credit union's owner-members, too.

Deny the petition.